FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

No. 162

EXCEL AUTO RADIATOR COMPANY,

Petitioner,

vs.

THE BISHOP AND BABCOCK MANUFACTURING COMPANY,

Respondent.

MEMORANDUM IN REPLY TO PETITION FOR REHEARING

ARTHUR H. BOETTCHER,
Counsel for Respondent.

31 W. Jackson Blvd.,
Chicago 4, Illinois.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948.

No. 162

EXCEL AUTO RADIATOR COMPANY,
Petitioner,

vs.

THE BISHOP AND BABCOCK MANUFACTURING COMPANY,
Respondent.

MEMORANDUM IN REPLY TO PETITION FOR REHEARING.

This is a patent validity and infringement case which has been fully presented below, in which rehearing was denied by the Court of Appeals, and in which a petition for writ of certiorari has once been denied by this Court.

Petitioner presents two purported grounds for its petition for rehearing. Neither of them is new. Both were presented in the original petition for writ of certiorari.

The first, entitled by petitioner as "Reason 1", was presented on Pages 3, 4, 5, 6, 11, 12, 14-16, 20 and 21 of its original petition and brief before this Court. Respondent replied on Pages 5-6 and 11-13 of its brief in opposition.

The second, entitled by petitioner as "Reason 2", was presented on Pages 3, 4, 5, 6, 10, 12, 17-20 of its original petition and brief before this Court. Respondent replied on Pages 10, 15-16 (note reference to appendix) of its brief in opposition.

It is at once apparent, therefore, that the instant petition disregards Rule 33 (Rehearing), Paragraph 2, of this Court, which paragraph provides that

> "Any petition filed under this paragraph must briefly and distinctly state grounds which are confined to intervening circumstances of substantial or controlling effect * * *, or to other substantial grounds available to petitioner although not previously presented * * *."

We assume that any repetitious reply argument here, in respect of petitioner's thus exhausted grounds, would likewise be out of order.

The instant petition also violates the following provision of said paragraph of said Rule:

> "A petition for rehearing filed under this paragraph must be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay, and counsel must also certify that the petition is restricted to the grounds above specified."

Since the instant petition, on its face, is not restricted to intervening circumstances or to grounds not previously presented, it precludes the second required certification, and no such certification is made. The first, which is made, rests with the conscience of the certifier.

The petition should be denied.

Respectfully submitted,

ARTHUR H. BOETTCHER,
Counsel for Respondent.

53 W. Jackson Blvd.
Chicago 4, Illinois.
October 29, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 162

EXCEL AUTO RADIATOR COMPANY,
Petitioner,

vs.

THE BISHOP AND BABCOCK MANUFACTURING COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND PETITION FOR REHEARING.

MAX W. ZABEL,
FOSTER YORK,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 162.

EXCEL AUTO RADIATOR COMPANY,
Petitioner,

vs.

THE BISHOP AND BABCOCK MANUFACTURING COMPANY,
Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

To the Honorable Frederick M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully requests leave to file the accompanying (second) petition for rehearing of the petition for writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit in the above entitled case, denied by this Court October 11, 1948; petition for rehearing denied November 15, 1948.

Reasons for Asking Leave.

In said petition for writ of certiorari on page 6, there was alleged as one reason for granting certiorari that no other litigation involving the patent was foreseeable except in the Sixth Circuit. After the order denying the petition for writ of certiorari, circumstances have occurred which unequivocally show a design on the part of respondent to confine litigation to the Sixth Circuit. Respondent has it within its power to do so. These circumstances are as follows:

1. On December 27, 1948, Respondent, The Bishop and Babcock Manufacturing Company, filed a patent infringement suit against Sears, Roebuck and Co. in the District Court of the United States for the Northern District of Ohio, Eastern Division, charging infringement of the patent in suit despite the fact that the alleged infringement by Sears, Roebuck and Co. was the sale of heaters manufactured by the E. A. Laboratories, Inc. who manufacture the said heaters in New York in the Second Circuit.

2. Petitioner has been informed by the attorney for E. A. Laboratories, Inc. that he has investigated the possibilities of filing a declaratory judgment suit against The Bishop and Babcock Manufacturing Company in view of the suit by The Bishop and Babcock Manufacturing Company against E. A. Laboratories' customers, but has found that such a suit cannot be brought outside of the Sixth Circuit since The Bishop and Babcock Manufacturing Company resides in the Sixth Circuit and is not registered to do business in any state outside of the Sixth Circuit.

3. Upon information and belief Petitioner also states that Respondent sells heaters coming under the Mayo patent involved in suit between Petitioner and Respondent through The Bishop and Babcock Sales Corporation, a sep-

arate corporate entity and a corporation of New York. By using this corporation to make sales in New York and other states outside of the Sixth Circuit, Respondent is enabled in effect to do business outside of the Sixth Circuit without being subject to a declaratory judgment suit to have its patent declared invalid outside of the Sixth Circuit.

It is believed that the above facts constitute well recognized ground for the exercise of jurisdiction by this Court, as more completely set forth in the proposed Petition for Rehearing.

Cases in which this Court has granted leave to file a petition for rehearing of an order denying a petition for writ of certiorari after the expiration of the period allowed by Rule 33 in similar circumstances include:

Kellogg Company v. *National Biscuit Company*, 304 U. S. 586; s. c. 302 U. S. 733, 777.

Schriber-Schroth Co. v. *Cleveland Trust Co.*, 304 U. S. 587; s. c. 303 U. S. 639, 667.

Paramount Publix Corp. v. *American Tri-Ergon Corp.*, 293 U. S. 528, 55 S. Ct. 139, 79 L. Ed. 638.

Altoona Publix Theatres, Inc. v. *American Tri-Ergon Corp.*, 293 U. S. 528, 55 S. Ct. 139, 79 L. Ed. 638.

We respectfully submit that this Court should grant Petitioner leave to file the accompanying petition for rehearing of the petition for writ of certiorari to the Court of Appeals for the Sixth Circuit in the instant case, denied October 11, 1948, and that the accompanying petition for rehearing should be granted.

Respectfully submitted,

MAX W. ZABEL,
FOSTER YORK,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 162.

EXCEL AUTO RADIATOR COMPANY,
Petitioner,

vs.

THE BISHOP AND BABCOCK MANUFACTURING COMPANY,
Respondent.

PETITION FOR REHEARING.

To the Honorable Frederick M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully requests that the Court reconsider its action of October 11, 1948, denying Petitioner's petition for writ of certiorari filed in the above entitled case July 19, 1948; that the order then entered in the case be revoked or vacated; and that a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit be granted according to the prayer of said petition.

The reason for this petition is that in the said petition for writ of certiorari on page 6, there was alleged as one reason for granting certiorari that no other litigation in-